IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 388 OF 1991

Jogeshwar Singh Shripal Singh Thakur
of Bombay since deceased by his legal heirs

1. Smt. Indrakumar J. Thakur.

2. Krishnapal J. Singh.

3. Amarbahadur J. Singh

of Indian Inhabitants, residing at
Pannalal Terraces, Room No.4,
Ground floor, Bombay- 400 007

4. Mrs. Leelawati Lalbhahadur Singh
   Indian Inhabitant residint at
Village Pure Dammar, Post Jagatpur
(Shankarpur) Dist. Raiberli (U.P.)

5. Mrs. Saroj Babul Pathak of Indian
   Inhabitant residing at 104-B, Girnar
   Apt. 60 Feer Rd. Near Jain Temple,
   Bhayander (W), Thane. ...Appellants.

V/s

1. Prasanna Narsingh Prabhu

2. Smt. Umabai Narsingh Prbhau

3. Miss. Vasanti Narsingh Prabhu

4. Dr. (Miss) Anila Narsingh Prabhu.

5. Miss Vijaya Narsingh Prabhu.

6. Dr. (Mrs.) Sarojini Palav

7. Mrs. Meera Satyawan Prasad Gupta.

8. Mrs. Sudha Amalkumar Das. .. Respondents

Shri G.S. Bhat, Advocate for the appellant
None for the respondents.

CORAM : K.J.ROHEE, J.
DATE : 13TH APRIL, 2006.

ORAL JUDGMENT

. Original defendant No.1 has preferred this appeal against the judgment and decree passed against him by the Judge, City Civil Court, Bombay in Suit No. 1504 of 1991 on 18th December 1990.

2. Respondent Nos. 1 and 2 (original plaintiffs) instituted suit against the appellant ((original defendant No.1) for possession of Panpatti Box and for compensation/damages of Rs. 4,587.50 for the user of the said Panpatti Box.

3. The admitted facts are that Narsingh Manjunath Prabhu (father of respondent No.1 and husband of respondent No.2) had purchased Ganga Vilas Hindu Hotel situated at 469, Grant Road, Bombay with its fixture, furniture, godown and Panpatti Box from one Smt. Gangabai Mancharam under Indenture of Assignment dated

31st July, 1987. According to respondents 1 and 2 N.M. Prabhu had given the said Panpatti Box to one Ambikaprasad Purushottam Tiwari from 11th November, 1948 at the rate of Rs. 2.50 ps. per day under a licence agreement. On 4th of May, 1951 the appellant wrote a letter to N.M. Prabhu requesting him for permission to conduct the said Panpatti Box by agreeing to pay him Rs. 2.50 ps. per day as compensation. On or about 8th of May, 1951 Ambikaprasad Tiwari gave back possession of the said Panpatti Box to N.M. Prabhu. On 12th May, 1951 the appellant executed a writing acknowledging receipt of various articles and Panpatti Box. Thus the appellant took the Panpatti Box on leave and licence basis. Initially the licence was to remain in force for a period of three years commencing from 4th May, 1951. Lateron the said period was extended from time to time. On 4th of May, 1963 the appellant refused to enter into a fresh leave and licence agreement and to hand over the possession of the Panpatti Box or to pay compensation to N.M. Prabhu. Hence by letter dated 27th April, 1963 N.M. Prabhu terminated the leave and licence agreement. The appellant raised various false contentions by his reply dated 30th April, 1963. Thereafter on 10th of August, 1963 N.M. Prabhu filed Ejectment Application

No. 368/E of 1963 before the Small Causes Court, Bombay. On 4th of February, 1964 N.M. Prabhu admitted respondent No.1 as a partner in the said hotel business with equal share. On legal advise N.M.Prabhu withdrew the ejectment application and the same was dismissed as withdrawn on 10/9/1966. On 24th June, 1967 N.M. Prabhu died. After his death respondent No.1 entered into partnership agreement with his mother (respondent No.2) and since 1st of February, 1969 they are carrying out said hotel business in partnership.

4. By letter dated 20th February,1970 all the respondents called upon the appellant to pay the arrears of compensation, to remove himself from the said Panpatti Box and to handover possession thereof to the respondents. By reply dated 16th May, 1970 the appellant made false allegations. The copy of the said letter was again sent by respondents to the appellant on 19th May, 1970.

5. On 24th March, 1970 the appellant filed declaratory suit No. 1666/1970 before the Small Causes Court, Bombay seeking declaration that he is the lawful tenant or alternatively he is the lawful sub-tenant of

the Panpatti Box and for perpetual injunction restraining the respondents from interfering with his possession over the Panpatti Box. Since the licence of the appellant has been validly terminated he is in occupation of the Panpatti box as a tresspasser. Respondents 1 and 2, therefore, prayed for possession of the Panpatti Box along with compensation/damages for the period from 6th February, 1966 till 14th February, 1971 as well as future compensation/damages till delivery of possession of the Panpatti Box.

6. The appellant resisted the suit by his written statement. He raised objection to the very tenability of the suit on the ground that the provisions of Bombay Rent Hotel and Lodging House Rates Control Act, 1947 are applicable to the Panpatti Box and as such the Court of Small Causes at Bombay alone has jurisdiction to try the suit. The City Civil Court has no jurisdiction to try and to entertain the suit. Hence the suit is liable to be dismissed.

7. The appellant further submitted that the Ejectment Application No. 368/E/ 1963 was withdrawn by N.M. Prabhu. The said suit was dismissed as withdrawn.

Hence the respondents are precluded from bringing fresh suit for eviction of the appellant.

8. According to the appellant he purchased the Panpatti business from Ambikaprasad Tiwari under an Indenture dated 12/9/1950. Soon thereafter N.M. Prabhu started harassing the appellant and demanding more money from him. The appellant had no alternative but to yield to the wishes of N.M. Prabhu in order to carry out his business peacefully. Under the insistence of N.M. Prabhu, the appellant executed sham, bogus and colourable agreement styled as agreement of leave and licence. In fact the said agreement was not intended to be acted upon. The renewal of said agreement was also got done in the same circumstances. The appellant submitted that he is lawful tenant in respect of the said Panpatti Box and alternatively he is lawful sub-tenant in respect of the same within the meaning of Thr Bombay Rent Act, 1947. He is in exclusive possession of the said Panpatti Box since 1950 and is entitled to the protection under The Bombay Rent Act, 1947. The respondents are not entitled to eject the appellant from the Panpatti Box, as his tenancy has not been legally terminated. The appellant is liable to pay

to the respondents only standard rent which would not exceed Rs. 10/- per month.

9. The appellant lastly submitted that the claim of the respondents for compensation/damages is barred by time.

10. Respondent No.1 examined himself, whereas the appellant examined himself in support of their respective claims. They have also filed several documents on record. After considering the oral and documentary evidence on record, the learned trial Judge held that the appellant was a licensee of the Panpatti Box and his licence was duly terminated. The appellant failed to prove that he is the lawful assignee of the Panpatti Box and that the appellant is not entitled to protection under the provisions of The Bombay Rent Act, 1947. The learned trial Judge also found that he has jurisdiction to entertain and to try the suit. The learned trial Judge however, found that the monetary claim of the respondents beyond 17/12/1971 is barred by limitation. The trial Judge, therefore, decreed the suit. He also directed enquiry into future mesne profit under Order 20 Rule 12 of Code of Civil Procedure. The

appellant has challenged the said judgment and decree.

11. I have heard Shri G.S. Bhat, Advocate for the appellant. None appeared for the Respondents. I have also gone through the record and proceedings of the trial Court. After considering the submissions made by the learned Counsel for the appellant the following points arise for my determination with my findings thereon.

(1) Whether the suit instituted by respondents 1 and 2 against the appellant for ejectment is not tenable for want of liberty to withdraw the earlier suit under Order 23 Rule 1(3) and (4)? ... The suit is tenable.

(2) Whether the suit instituted by respondent 1 and 2 against the appellant is barred by limitation? ... No.

(3) Whether the direction given by the trial Court for enquiry into future mesne profit under Order 20 Rule 12 of Code of Civil Procedure is liable to be set aside? ... Yes.

(4) What order? ... The appeal is partly allowed.

REASONS

12. Shri Bhat submitted that Ejectment Application No. 368/E/1963 filed by N.M. Prabhu was dismissed as withdrawn. No liberty was sought by N.M. Prabhu to institute fresh suit. The present suit has been instituted without seeking prior permission of the Court and as such the present suit is not tenable under Order 23 Rule 1 (3) and (4) of Code of Civil Procedure. Shri Bhat submitted that this technicality goes to the root of the matter and that the trial Court did not consider this aspect.

13. In order to appreciate the above submission the provisions of Order 23 Rule 1 (3) and (4) will have to be looked into they are as under:

> "(3) Where the Court is satisfied, -
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> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,
>
> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to

> institute a fresh suit in respect of subject-matter of such suit or such part of the claim.
>
> (4) Where the plaintiff-
>
> (a) abandons any suit or part of claim under sub-rule (1), or
>
> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

14. It is not disputed that the ejectment application was withdrawn in view of the interpretation of the word premises in The Bombay Rent Act. It was found that the Panpatti Box was not premises within the meaning of The Bombay Rent Act and as such the plaintiff therein was advised not to prosecute the suit. On this background the position that emerges is that there was no suit in the eyes of law. Hence, the withdrawal of the said suit without liberty to institute fresh suit is of no consequence. As such the plaintiff therein was not precluded from instituting suit in respect of the same subject matter.

15. Shri Bhat further submitted that according to the respondents the licence of the appellant expired on

4th May, 1963. The licence was terminated by letter dated 27th April, 1963 from the end of 4th May, 1963. Shri Bhat submitted that under Article 113 in any suit for which no period of limitation is provided in the schedule, period of limitation is 3 years and the time begins to run when right to sue accrues. Shri Bhat submitted that the suit for eviction could have been instituted within 3 the years from 4th May, 1963. Since the present suit is instituted on 15th February, 1971 the same is patently barred by limitation. Shri Bhat submitted that the learned trial Judge was wrong in observing that in case of a trasspasser the tortious act would give continuous cause of action. Shri Bhat submitted that firstly it is not a tortious act and as such there is no question of recurring cause of action.

16. The fallacy of the above submission can be seen from the fact that no doubt the licence of the appellant was revoked by the end of 4th May, 1963 and the Ejectment Application No. 368/E/1963 was also withdrawn, however, the occupation of the appellant from 5th May, 1963 was condoned by the respondent by letter dated 20th February, 1970 and the licence of the appellant was revoked w.e.f. 21/2/1970. So the period

of limitation will begin from the subsequent termination and thus, the suit instituted on 15th February, 1971 is perfectly within limitation.

17. Shri Bhat lastly submitted that the trial Court erred in directing enquiry into future mesne profit under order 20 rule 12 of C.P.C. from the date of filing of the suit till the delivery of possession of the Panpatti Box. Shri Bhat pointed out that Order 20 Rule 12 applies only where the suit is for recovery of possession of immovable property and for rent of mesne profit wherein such a direction can be given. Since according to the respondents themselves Panpatti Box is not a premises within the meaning of The Bombay Rent Act the provisions of Order 20 Rule 12 would not apply. Consequently the direction given by the trial Court is without jurisdiction and it needs to be set aside.

18. I am in full agreement with this submission made by Shri Bhat. In the instant case the trial Court had no jurisdiction to order enquiry into future mesne profit. The respondent could have filed suit for recovery of compensation/damages after every three years. That much part of the judgment, therefore,

cannot sustain. In the result I pass the following order.

ORDER

(i). The appeal is partly allowed.

(ii). The Judgment of the trial Court so far as it relates to para No.1, 2,4, 5 and 6 of the operative part of the order is confirmed.

(iii). Direction contained in para No.3 of the operative order is set aside.

(iv). In the circumstances the appellant to bear the costs of the respondents.

[K.J. ROHEE, J.]